nature, had no power to admit such an attempt, but relies upon it as shewing the plaintiff's intention not to affirm the mortgage. Regretfully, however, I think we can only deduce a belated and futile attempt to revoke a binding election already made. Lastly we are referred to the consent order of 12th September, 1910. If that order had not been wiped off the record by its reversal, there might have been such acquiescence on record against the 1st defendant as might have put him out of Court in this Appeal. He has changed his mind since the date of that order and now takes advantage of his sub-mortgagee's intervention to raise this plea of estoppel. His conduct is sharp, and his consent in September, 1910, was more honest and more admirable. But I know of no legal reason why he should not change his mind and rest upon his legal rights. The decree of 13th August, 1909, remains of full force and effect, and governs and colours all subsequent proceedings under the Originating Summons. It renders the plaintiff's subsequent intention to revoke his election, nugatory, by being belated. It has the effect, further, of so clouding his subsequent actions, as to prevent any clear deduction as to intention: at one and the same time by reason of the unreversed decree plaintiff is made to continue to approbate, while, by his subsequent conduct, he seeks to reprobate, the mortgage. Now can you deduce intention from circumstances so contradictory?

I am regretfully aware that if the decision of the Court below be upheld, the plaintiff suffers great hardship. His remedy, however, does not seem to be against the respondent. Mr. Koek, moreover, contends that it is still open to the Plaintiff to claim damages in an action of deceit, but we are not called upon to make any ruling upon this point. In my opinion, the plaintiff made election, and is now estopped in the present suit, and the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the Plaintiff—*Allen & Gledhill.*

Solicitors for the 1st Defendant—*Koek & Knowles.*

Solicitors for the 2nd Defendant—*Drew & Napier.*

Solicitors for the Plaintiff (Appellant)—*Donaldson & Burkinshaw.*

Solicitors for the 1st Defendant (Respondent)—*Koek & Knowles.*

Solicitors for the 2nd Defendant—*Drew & Napier.*

[APPELLATE CIVIL JURISDICTION]

WHITLEY, J.

March 9, 1931.

S. V. S. MUTHURAMAN CHETTIAR,

Etc.....Plaintiffs (Appellant)

vs.

E. KONG GUAN & Anor., Etc.....Defendants (Respondents)

[MALACCA CIVIL SUIT No. 36 of 1925]

Practice—Appeal—Refusal of appellant to pay costs ordered to be paid by him—Vexatious proceeding—Ground for stay—Further security for costs—Civil Procedure Code, Ss. 1129, 1150.

The Court has power to make an order for security for unpaid costs and to stay further proceedings in default whenever it appears that a party is proceeding vexatiously in not paying costs which he has been ordered to pay.

The grounds on which further security for costs of a pending appeal will be ordered discussed.

Motions heard before Whitley, J. sitting as a single Judge under Section 1150 of the Civil Procedure Code.

The 1st and 2nd Defendants (respondents) filed two Motions respectively dated the 23rd and 24th of February, 1931. In the first Motion the 1st defendant asked *inter alia* for an order staying all further proceedings in the action until after the plaintiff (appellant) had paid to him or into Court the amount of taxed costs directed to be paid by plaintiff to this defendant under a Judgment dated the 14th of November, 1930, or until after the plaintiff had provided security in that amount and (2) further security for costs of the pending appeal. In the second Motion the 2nd defendant applied for an order directing plaintiff to pay into Court the amount of taxed costs awarded to him in the action or to furnish security for that amount and, in default, for an order dismissing the appeal filed by the plaintiff-appellant and further that the appellant be directed to increase the security for costs of the appeal from $250 to $6,000. Both Motions were supported by affidavits sworn to by the respective defendants which disclosed the following facts:—

1. The plaintiff had not paid the taxed costs of the two defendants under the Judgment of the 14th of November, 1930.

2. The plaintiff sued as the administrator *de bonis non* of the Estate of S. V. S. Supramaniam Chetty deceased. Neither

the Estate nor the plaintiff had any property within the jurisdiction of the Court.

3. The whole of the Estate of the said Supramaniam Chetty devolved upon his only son S. V. S. Shunmugam Chetty, formerly a third party in the action. Shunmugam Chetty who was in a position to pay the costs of the action and/or of the Appeal, has been dismissed from the action.

The affidavit of V. R. A. R. Singamuthu Pillay the attorney of the plaintiff S. V. S. Sockalingam Chetty (appellant) in opposition to the Motions, stated that the Estate of Supramaniam Chetty deceased had assets in Kuala Lumpur in the nature of landed properties which could be made available for payment of the costs of the respondents already then due and to be due. The deponent denied that the Estate of Supramaniam Chetty passed to Shunmugam Chetty as the deceased's sole heir.

E. A. Stevens for 1st Defendant in support of the first Motion.

Campbell for 2nd Defendant in support of the second Motion.

Knowles for plaintiff *contra*.

Cur. Ad. Vult.

WHITLEY, J.—These two motions came before me as a single Judge under Section 1150 of the Civil Procedure Code as the Court of Appeal is not sitting.

I am satisfied that on the authority of *In re Wickham, Marony* v. *Taylor*, reported in 35 Ch. D. 272 the Court has power to stay the proceedings whenever it can be shown that a person is proceeding vexatiously in not paying costs which he has been ordered to pay.

It is clear that under Section 1150 of the Civil Procedure Code I have no power to dismiss the appeal in default as asked to do by the 2nd Respondent.

V. R. A. R. Singamuthu Pillay appellant's attorney in his affidavit filed on 27th February, 1931, states that his principal has sufficient funds to prosecute his claim and Mr. Knowles stated that he could not say why the costs has not been paid.

I am of opinion that the appellant is proceeding vexatiously in not paying the costs which he has been ordered to pay and which both Respondents have asked him to pay. Appellant is entitled to recover against the second respondent certain costs which have not yet been taxed. He states that he is informed that these costs will amount to between $4,000 and $5,000 but does not in this affidavit state as I think he ought to do what is the source of his information and the 2nd Respondent's counsel states this estimate is greatly exaggerated. However I think it fair to make some allowance in respect of this and I allow $2,000. Second Respondent has been allowed a further $900 on taxation in addition to the sum mentioned in his motion. Taking this also into account I fix a round figure of $8,000 as the sum for which appellant ought to find security for costs already ordered to be paid by him to the 2nd Respondent.

I am satisfied that both respondents are entitled to an order for further security for the costs of appeal under Section 1129(2) of the Civil Procedure Code on the following grounds:—

1. That appellant has not yet paid the costs ordered to be paid by him in the Court below.

2. That appellant resides in India and apparently has no property in the Colony.

3. That it is alleged in the affidavit of 2nd Respondent and not specifically denied by the appellant that the third party dismissed from the suit is the person who really stood to gain if appellant had succeeded in his claim and that this party is resident within the jurisdiction.

It was urged on appellant's behalf that on the authority of *In re Clough*, 35 Ch. D. p. 7, that the respondents are too late in view of the fact that the appeal is fixed for March 9th.

The correspondence exhibited shows however that both respondents gave notice as early as they could that they would ask for security and I do not think that appellant is being taken by surprise at the eleventh hour.

As the Court of Appeal sits on March 9th, I am unable to give longer time to the Appellant but he can of course apply to have my order varied. Had it not been for this fact I should have given him considerably longer time.

Order accordingly.

Solicitors for 1st defendant (respondent)—
Allen & Gledhill.

Solicitors for 2nd defendant (respondent)—
Rogers & Son.

Solicitors for plaintiff (appellant)—
Braddell Brothers.